IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-259

AMF INCORPORATED,
Petitioner

v.

GENERAL MOTORS CORPORATION, *et al.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondents, in their Brief in Opposition, admit the existence of "several incidents occurring after January 10, 1965" (Br. in Opp. 16), the critical statute of limitations date, which AMF alleges are examples of continuing conspiratorial conduct aimed at excluding it from the market for exhaust control devices. These overt acts include an acknowledged refusal to deal by Ford in April 1965, respondents' pricing of the air injection system at below cost so that it could meet the price of AMF's Smog Burner and achieve certification, and the "joint development of an air pump in 1965." (Br. in Opp. 21-22) Consistent with the erroneous holding of the court of appeals, however, respondents contend that a cause of action cannot be based on

these acts because they caused AMF "no new injury" not caused by respondents' conspiratorially-announced refusal to deal in 1964 (Br. in Opp. 16).

Respondents' argument only serves to emphasize the conflict between the decision below and those of other courts of appeals. For example, respondents' assertion that the admitted refusal to deal by Ford in 1965 "hardly constitutes an additional rejection of the Smog Burner for a period different from that covered by the 1964 rejection . . ." (Br. in Opp. 22) is squarely at odds with the law of the Fifth and other Circuits. (*See* Pet. 12 n.8.) Contrary to respondents' arguments and the Ninth Circuit's holding in this case, the Fifth Circuit has specifically held that "reiteration of defendants' refusal to deal would have constituted an 'act' within the meaning of *Zenith* and . . . [thus given] 'rise to an antitrust cause of action.' " *Imperial Point Collonades Condominium* v. *Mangurian,* 549 F.2d 1029, 1035 (5th Cir. 1977), *cert. denied,* 434 U.S. 859 (1978).[1] This is because AMF's exclusion from the

[1] Not surprisingly, respondents cite Garelick v. Goerlich's Inc., 323 F.2d 854 (6th Cir. 1963) in support of their position that their 1964 refusals can, as a matter of law, be considered final and irrevocable and that any reiteration of these refusals is not an act for which damages lie under the antitrust laws (Br. in Opp. 20). *Garelick* was also cited by respondents in the court of appeals, and the Ninth Circuit's opinion in this case is in accord with that decision. In *Garelick,* plaintiff (distributor of defendant's products) was notified more than four years prior to bringing suit, allegedly in violation of the antitrust laws, that defendant would cease doing business with it. Plaintiff, however, had at two separate occasions within the four years preceding suit requested to defendant and defendant's salesmen to be reinstated. In an analysis similar to that of the court of appeals in this case, the Sixth Circuit held that plaintiffs "were not in any way injured or damaged" by these subsequent overt acts since they "were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants" (323 F.2d at 856).

Garelick was specifically cited and rejected by the Fifth Circuit in Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 125 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976). The *Poster Exchange* court read this Court's decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) as "lay[ing] to rest the theory that . . . suit upon a continued antitrust violation must be prosecuted within four years from the first act of illegality . . ." as well as "eschewing the requirement of acts different in kind to set up a later accruing cause of action." (517 F.2d at 126-27)

market as a result of respondents' 1964 refusals "while perhaps unequivocal, was not of necessity permanent . . . ." *Poster Exchange, Inc.* v. *National Screen Service Corp.,* 517 F.2d 117, 127 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976). Respondents need not have continued to adhere to the conspiracy in 1965, which resulted in AMF's continued injury. Rather, "defendants could have quit causing the injury at any time by agreeing to deal with plaintiff . . . ." *Mangurian,* 549 F.2d at 1035. Ford was given this choice in April of 1965, at a time when it was having severe problems with its own air injection system. Nevertheless, Ford adhered to the conspiracy.

Moreover, in the instant case, the "several incidents" which occurred in 1965 consisted of more than mere reiterations of respondents' 1964 refusals. Respondents' conspiratorial "episodes" in 1965 injured AMF by perpetuating its exclusion from the market and by creating added barriers to market entry. Furthermore, this continued conspiratorial conduct was essential for the conspiracy's success. For example, respondents consistently justified their lack of interest in outside devices by representing to the MVPCB that "the price to the consumer" of their own air injection system,

once developed, would be less than that of the certified devices. (R.5259) These representations forced respondents to beat the price to the consumer of the AMF Smog Burner, which respondents recognized, in July of 1965, was "the lowest priced device already certified" (R.5394). Failure in this regard would have resulted in respondents "not receiv[ing] certification in July [1965]" because "the Board cannot certify our system until a maximum selling price has been established." (*Id.*)[2] Therefore, in July of 1965 respondents, pursuant to the conspiracy, priced air injection without regard to cost, encountering staggering losses in the process. Respondents do not deny this critical factor.

Thus, the record clearly and indisputably demonstrates that rather than being "the least of their worries at that time" (Br. in Opp. 22), the potential competition of the economically priced and "certified . . . AMF afterburner" (R.5394) was, in 1965, the last major barrier to the success of the conspiracy. Nevertheless, the court of appeals has immunized unlawful acts, which occurred within the statutory period, by reasoning that these conceded post-limitations "episodes" were the "unabated inertial consequences" of respondents' "permanent" 1964 refusals to deal (App. 11a *quoting Poster Exchange,* 517 F.2d at 128). This analysis, which not even respondents seriously attempt to defend, is incorrect. The law pertaining to the application of the statute of limitations in cases of continuing

[2] Board regulations prohibited any "undue cost burden to the motorist" (MVPCB Regulations, Part 5, § A). Thus, had the announced price of air injection reflected its true cost, it is doubtful the device would have been approved and the market would have been opened to AMF.

antitrust conspiracies carried a degree of ambiguity before the decision below was rendered. Now, as a result of that decision, one district court already has relied upon the Ninth Circuit's erroneous ruling and stated that post-limitations acts which are essentially the same as pre-limitations conduct cannot provide the basis for an antitrust cause of action. *Woodbridge Plastics, Inc.* v. *Borden, Inc.,* No. 78-5709 (S.D.N.Y. July 2, 1979).[3] This Court should grant the petition and reverse lest the opinion below introduce further uncertainty and conflict on this important subject.

On the issue of whether AMF's damages were ascertainable in 1964 so that a cause of action accrued to AMF at that time, the Brief in Opposition serves to highlight the misapplication by the court of appeals in this case of the rule in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971). Respondents are forced to recognize at least that under cases in the Second and Third Circuits, fundamental market contingencies resulting "from uncertainty as to the future actions of others" render damages speculative and unprovable, and thus prevent a cause of action from accruing. (Br. in Opp. 28) They argue, however, that

[3] The district court in *Woodbridge Plastics* characterized the holding in the present case as follows:

> Each of the defendants had announced their intention to refrain from . . . purchase [of the AMF Smog Burner] at a meeting in 1964, more than four years prior to the commencement of suit. Their only actions within the four-year period were to adhere to this position and reject renewed requests by plaintiff to sell its product. The Court of Appeals affirmed the dismissal of the complaint as time-barred, finding any injury to plaintiff to have been attributable to the final denials in 1964. The Court characterized the later, reiterated rejections as nothing more than the " 'unabated inertial consequences of some prelimitations action.' " (Slip op. at 6; citations omitted.)

the facts in this case incontrovertibly demonstrate that respondents *themselves* had full control over whether AMF could market its device in California. (*Id.* at 28-29)

Nothing could be further from the truth. Whether AMF would ultimately suffer complete, partial, or no exclusion from the state-mandated market for exhaust control devices as a result of respondents' 1964 announcements was, in 1964, completely beyond the parties' control.[4] Prior to January 10, 1965, respondents' own systems were at a rudimentary stage of development, and certification testing of air injection had not even begun. Respondents proceeded to have serious difficulties with air injection throughout the first half of 1965. Whether certification would be obtained, and if so, on what models, was uncertain until the very end (*e.g.*, R.5749-72; R.5776-77) and rested in the judgment, not of respondents, but of the State of California. Indeed, respondents themselves recognized this as evidenced by their concern that the Board might withdraw certification if "the device in the hands of the public was not functioning properly." (R.5797).

Under these circumstances, no jury could have speculated in 1964 whether respondents would eventually be certified.[5] If respondents had failed to achieve certification, it is almost certain that AMF, with the most effective and most economical device,[6] would have made at least some sales, either to the respondents themselves or, by force of state law, to others for in-state installation. (See Pet. 18).[7] Thus, the present case falls squarely within the rule in *Zenith,* and no cause of action accrued until respondents' certification in mid-1965. The misreading of the decision in *Zenith* by the Ninth Circuit, which conflicts with what respondents concede is the way the rule has been applied in the Second and Third Circuits, requires review by this Court.

[4] Respondents' citation of counsel for AMF's remarks concerning AMF's damages in this case, made at the January 19, 1976 hearing in the district court, is both irrelevant and misleading. (Br. in Opp. 26) These comments concerned AMF's provable damages *at this time,* and have nothing to do with the ascertainability of AMF's damages prior to January 10, 1965.

[5] Despite respondents' continued arguments to the contrary, there is no comparison between the arduous procedures for initial certification that AMF had passed prior to June of 1964, which involved testing on a fleet of 30 used cars representative of the entire vehicle population of the state (R.4150-52), and final certification for production, which merely involved a derivative, not *de novo,* staff determination "that the [modified device] . . . falls within the scope of the original certification." (MVPCB Regulation Part 7 at 2).

Moreover, Board Regulations did not contemplate certification of the Smog Burner for production until after AMF established commercial relationships for its sale and the identity of the models on which it would be installed. (*Id.* at 2-3) Due to the comparability, in design and performance, of the certification prototype and production model (*e.g.*, R.6040, R.6042, R.6044, R.6050, R.6051, R.6141, R.6144, R.6148, R.6184, R.6194-95), final Board approval of the AMF production unit, if defendants purchased it, was assured. Indeed, even the district court acknowledged that "nobody questions the ability of AMF to do the hardware" (Tr. of Proceedings, 1/19/76 at 58).

[6] *See e.g.*, R.6050; R.6076; R.6077-78; R.6130-31; R.4145-46; R.6145-46; R.6147.

[7] Defendants' repeated reference to the "decertification" of AMF's device in September of 1965 is irrelevant to the issues before this Court and was not a basis for the decision in the court of appeals. Certification was suspended on September 15, 1965 for devices "*not now in production*" (MVPCB Resolution 65-26, R. 5845) and would not have applied to the Smog Burner if any defendant had previously elected to use it. Additionally, certification for all systems was "for the 1966 model year only" and recertification for 1967 was considered "only a technicality" (R. 5846-48).

Finally, the bulk of respondents' 30-page Brief in Opposition does nothing more than discuss contested factual disputes between the parties, such as AMF's intention, preparedness, and ability to market its certified pollution-control device in 1965, and respondents' motives when they engaged in the various "episodes" aimed at excluding AMF from the market after the critical statute of limitations date. Indeed, the Brief in Opposition resembles more a brief in support of a jury verdict than one defending summary judgment. As such, it confirms the serious abuse of discretion committed by the court below, and accordingly, the need for this Court to exercise its supervisory power to correct this error.

Assuming a conspiracy in 1964 to exclude AMF from the market for exhaust-control devices, respondents' one-sided and self-serving interpretations of the events of 1965 can be given no weight on summary judgment. The record contains abundant evidence from which a jury could find that AMF was not only capable of entering the market in 1965, but was actively attempting to market its device, by among other things, calling on Ford and International Harvester and quoting a firm production price. (See Pet. 8.) Further, the record also contains abundant evidence from which a jury could find that the AMF Smog Burner was the most effective and economical device available in 1965. Finally, the fact that many of respondents' actions, such as their predatory below-cost pricing in July of 1965, were specifically aimed at the AMF Smog Burner speaks strongly of the fact that the Smog Burner project was very much alive and that further action was needed to assure AMF's market exclusion and the success of the conspiracy.

In short, the Brief in Opposition stands as strong emphasis of the serious errors committed below and the need for review by this Court. This Court should grant the petition and make it clear that the statute of limitations cannot be employed, as here, to immunize repetition or continuation of antitrust violations. The ruling below extends the statute far beyond its purpose and stands as a barrier to enforcement of private rights through private actions under the antitrust laws. *Poster Exchange, Inc.*, 517 F.2d at 127-28.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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